

UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

On January 21, 2009, plaintiff John Brosnan ("plaintiff"), proceeding *pro se*, filed an amended complaint ("complaint") against defendants Alvin Florida Jr. ("Florida"), Realty Info Systems ("RIS"), and Monetary Recovery Service, Inc. (collectively "defendants").¹ Defendants filed an answer on March 5, 2009. Plaintiff's complaint alleges five causes of action for: (1) violation of the Racketeer Influenced and Corrupt Organizations Act

¹ On March 3, 2009, I related this case to an earlier filed action (Case No. 08-5216), which has also been assigned to me. This case was therefore reassigned to me for all further proceedings. All parties have consented to my jurisdiction, including entry of final judgment, pursuant to 28 U.S.C. § 636(c) for all proceedings.

1 ("RICO"), 18 U.S.C. §§ 1961 *et seq.*; (2) violation of the
 2 Lanham Act, 15 U.S.C. § 1125(a); (3) personal injury/illegal
 3 conversion; (4) fraud; and (5) breach of contract.² Pursuant
 4 to Rule 12(c) of the Federal Rules of Civil Procedure,
 5 defendants move for judgment on the pleadings as to
 6 plaintiff's second cause of action for failure to state claims
 7 upon which relief can be granted.³

8 Defendants argue that plaintiff's second cause of action
 9 for violation of the Lanham Act should be dismissed because
 10 plaintiff lacks standing to bring a claim under the Lanham
 11 Act. Section 43(a) of the Lanham Act, 15 U.S.C. § 1125(a),
 12 prohibits the use of false designations of origin, false
 13 descriptions, and false representations in the advertising and
 14 sale of goods and services. Smith v. Montoro, 648 F.2d 602,
 15 603 (9th Cir. 1981). Accordingly, the Lanham Act encompasses
 16 both false association and false advertising claims.
 17 Plaintiff's Opposition clarifies that he only seeks Lanham Act
 18 relief pursuant to 15 U.S.C. 1125(a)(1)(a), for false
 19 association.⁴ (Pl.'s Opp. to D's Mot to Dismiss ¶ 7.)

20 ² In his opposition brief, plaintiff withdrew his RICO
 21 claim, mooted this motion as to the first cause of action. Of
 22 the four causes of action that remain, the first three causes
 23 of action are brought against all three defendants, and the
 last is brought against defendants Florida and RIS.

24 ³ A motion for judgment on the pleadings pursuant to
 25 Federal Rule of Civil Procedure 12(c) is subject to the same
 standard as a Rule 12(b)(6) motion to dismiss. See Hal Roach
Studios, Inc. v. Richard Feiner & Co., 896 F.2d 1542, 1550 (9th
 Cir. 1990).

26 ⁴ To the extent that plaintiff intends to assert a
 27 false advertising claim under the Lanham Act, that claim is
 28 **DISMISSED**. A false advertising claim requires: (1) false or
 deceptive advertisements and representations to customers; (2)

1 Plaintiff's claim under section 43(a) is premised on the
 2 theory that defendants misrepresented their association with
 3 the Better Business Bureau ("BBB") by falsely stating that RIS
 4 was a member in good standing of the BBB.

5 The Ninth Circuit has held that to have standing to
 6 present a false association claim, a plaintiff must either
 7 have a commercial interest in the product wrongfully
 8 identified with another's mark, or a commercial interest in
 9 the misused mark itself. Waits v. Frito-Lay, Inc., 978 F.2d
 10 1093, 1109-10 (9th Cir. 1992) (citing, *inter alia*, Dovenmuehle
 11 v. Gilldorn Mortgage Midwest Corp., 871 F.2d 697, 700-01 (7th
 12 Cir. 1989) (only those with present commercial interest in
 13 trade name have standing to sue for its wrongful use under §
 14 43(a)). Plaintiff has not alleged facts that demonstrate that
 15 he has standing to bring a claim against defendants for the
 16 apparent misuse of the BBB's accreditation endorsement.
 17 Plaintiff has not alleged that he owns the BBB mark or that he
 18 has a commercial interest in the mark. Nor has plaintiff
 19 alleged that he has a commercial interest in any product

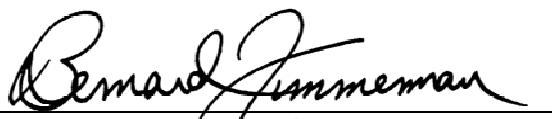
20 which advertisements and representations actually deceive a
 21 significant portion of the consuming public; and (3) injury
 22 caused by such conduct. See William H. Morris v. Group, Inc.,
 23 66 F.3d 255, 257 (9th Cir. 1995). The injury must be
 24 "competitive," i.e., harm to plaintiff's ability to compete
 25 with the defendant. Barrus v. Sylvania, 55 F.3d 468, 469-70
 (9th Cir. 1995). Accordingly, to have standing to sue, a
 26 plaintiff must allege that he or she is in competition with the
 27 defendant. See Waits v. Frito-Lay, Inc., 978 F.2d 1093, 1109
 (9th Cir. 1992) ("... claims of false representations in
 28 advertising are actionable under section 43(a) when brought by
 competitors of the wrongdoer, even though they do not involve
 misuse of a trademark."). Here, plaintiff does not allege that
 he commercially competes with any of the defendants such that
 he has standing to sue for any false representations on
 defendant RIS' website.

1 wrongfully identified with the BBB's mark. Accordingly, **IT IS**
2 **ORDERED** that the motion is **GRANTED** and plaintiff's Lanham Act
3 claim is **DISMISSED**.⁵

4 Having dismissed the claims over which this Court has
5 original jurisdiction, and having found that no diversity
6 exists between the parties to this action (See Case No. 08-
7 5216, Doc. No. 77), in the interests of judicial economy,
8 convenience, and fairness to the litigants, **IT IS FURTHER**
9 **ORDERED** that the remaining state law claims are **DISMISSED**
10 **WITHOUT PREJUDICE** pursuant to 28 U.S.C. 1337(c)(3); *see also*
11 United Mine Workers v. Gibbs, 383 U.S. 715, 726 (1966); Growth
12 Horizons v. Delaware Co., Pa., 983 F.2d 1277, 1284 (3d Cir.
13 1994).

14 I find no need for argument and **VACATE** the hearing set
15 for June 24, 2009.

16 Dated: June 22, 2009



Bernard Zimmerman
United States Magistrate Judge

19 G:\BZALL\BZCASES\BROSNAN V. FLORIDA\RELATED CASE DOCUMENTS\ORDER Granting 12(C) MOT TO
20 DISMISS.wpd

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24 ⁵ Plaintiff has not requested leave to amend, nor has
25 plaintiff offered any facts that, if pled, would support a
26 claim for a violation of the Lanham Act. Plaintiff alleges
27 that he is the assignee of a joint venture agreement that was
28 breached by defendants. While these alleged facts may be
sufficient to support various state law claims, it is not
conceivable that they could support a Lanham Act claim.
Accordingly, I find there is no need to grant plaintiff leave
to amend.